

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

ROSS COUNTY WATER)	CASE NO. 2:08-CV-735
COMPANY, INC.)	
)	JUDGE MICHAEL WATSON
Plaintiff-Counter Defendant,)	
)	
vs.)	PLAINTIFF'S POST HEARING
)	BRIEF IN SUPPORT OF
CITY OF CHILLICOTHE)	MOTION FOR TEMPORARY
)	RESTRAINING ORDER
Defendant-Counter Plaintiff.)	

STATEMENT OF THE CASE

Plaintiff, Ross County Water Company, Inc. ("RCWC") filed its complaint against the City of Chillicothe alleging Chillicothe violated the anti-curtailment provisions of 7 U.S.C. § 1926(b) and requesting that the Court enjoin Chillicothe from encroaching upon RCWC's service territory. In furtherance of its request for injunctive relief, RCWC filed a Motion for a Temporary Restraining Order, which the Court granted on July 31, 2008. The Court held a preliminary injunction hearing on August 14, 2008, which was continued until September 4, 2008 at the request of Chillicothe.

On September 2, 2008, Chillicothe filed its Answer, Counterclaim and Motion for Temporary Restraining Order alleging that RCWC was not entitled to § 1926(b) protection and that Chillicothe was entitled to serve the disputed area under the Ohio Constitution and the Ohio Revised Code. The Court consolidated the issues raised by both RCWC and Chillicothe in their respective motions for purposes of the September 4, 2008 preliminary injunction hearing.

FACTUAL BACKGROUND

RCWC is a non-profit association organized in accordance with Ohio laws in 1970 to provide safe and potable drinking water to rural areas throughout the unincorporated areas of Ross County, Ohio. To finance the construction of various water transmission facilities, RCWC borrowed in total approximately 10.6 million dollars from the United States Department of Agriculture through a loan program specifically designed for rural water districts. *See* August 14, 2008 Tr. pg. 52.

On June 29, 1971, RCWC and Chillicothe entered into a Water Service Agreement, whereby RCWC permitted Chillicothe to provide water service to Adena Regional Medical Center and Colomet industrial site in consideration for the right to serve the remaining unincorporated areas of Ross County. *See* PX 12. Chillicothe has now taken the position that it never adopted an ordinance authorizing the mayor to execute the agreement, although the parties have lived by its terms for thirty-five years.

Less than a year after Chillicothe agreed that RCWC would serve unincorporated Ross County, the Ross County Commissioners by resolution, granted RCWC a blanket easement to construct its waterlines in all right-of-ways throughout Ross County. *See* PX 13. Notably, the resolution recognized that RCWC eliminated the need for Ross County to establish its own water distribution system (as permitted under Chapter 6117 of the Ohio Revised Code), which would have otherwise been necessary to provide safe water to residents in dire need. *Id.* Since that time to present, RCWC has constructed a sophisticated water distribution system throughout the unincorporated areas of Ross County.

One of those areas developed by RCWC, and the subject of this litigation, includes an area near the center of unincorporated Ross County in Green Township, approximately two miles

north of Chillicothe's municipal boundaries. *See* PX 8, PX 9 and PX 10. Generally, this area is bordered on the west by Route 23, to the north by the Route 207 interchange, to the south by a parcel known as Classic Brands, and to the east by properties adjacent to Hospital Road, which parallels Route 23 to the east. Delano Road bisects this area in an east-west direction. For purposes of discussion, the disputed area is divided into two groups of parcels – those north of Delano Road and those south of Delano Road.

In April and June 2008, RCWC constructed an eight-inch waterline from its existing ten-inch waterline on Delano Road, in a southerly direction to a termination point at the southernmost boundary of a parcel designated on PX 9 as an abandoned freight company. In August 2008, Chillicothe began its own waterline extension in front of Classic Brands on Hospital Road, intending to parallel RCWC's then-existing waterline in a northerly direction along Hospital Road for approximately one mile. This extension was authorized by emergency legislation adopted by city council on April 14, 2008. *See* September 4, 2008 Tr. pg. 49 and DX 11. However, the authorization was only to extend water and sewer from Classic Brands to Delano Road, and not north of Delano.¹ *See* PX 46 and PX 47. It was this act by Chillicothe that ultimately gave rise to RCWC's complaint for injunctive relief.

At the preliminary injunction hearing on August 14, 2008 and September 4, 2008, RCWC presented uncontroverted evidence that it considered the disputed area as part of its service territory for over thirty years, relying in large part on the 1971 Agreement with Chillicothe, and its subsequent placement of waterlines throughout and adjacent to the disputed

¹ At the September 4, 2008 hearing, the Chillicothe's engineer, Thomas Day, P.E., admitted that Chillicothe never passed an ordinance for the extension of water lines north of Delano Road. *See* Sept. 4, 2008 Tr. Pgs, 79-80, DX 10 and DX 11. He also testified there was no emergency for the ordinance adoption.

area throughout this lengthy period.

Specifically, William Neal, General Manager of RCWC, testified that RCWC constructed a six-inch waterline on the west side of Route 23 in 1975, which extended to an emergency connection with the City of Chillicothe. *See* August 14, 2008 Tr. pgs. 14-15, 48-49, PX 6 and PX 9. In fact, Chillicothe required the use of the emergency connection for three weeks in 1988 when its own water supply was depleted. *See* August 14, 2008 Tr. pg. 49 and PX 25. It had been the long-term plan of RCWC to serve parcels on the east side of Route 23 and south of Delano Road by boring underneath the highway. *See* September 4, 2008 Tr. pg. 40-41. But to reduce the cost associated with this process, RCWC planned and constructed an eight-inch waterline along Hospital Road, thereby also reducing the overall per-user cost absorbed by the customers. *Id.*

From south to north respectively along Hospital Road to Delano Road, the parcels adjacent to this eight-inch line include the abandoned freight company, a parcel owned by a Dr. Cosenza, and a parcel known as the Warner property. *See* September 4, 2008 Tr. pg. 88, PX 9 PX 10 and PX 11. The Warner parcel, which encompasses over 72 acres and is bisected by Route 23, has been served by RCWC since the mid 1970s through a tap located on the western portion of the parcel. Now, RCWC makes service available to these properties through its six-inch waterline, also located and parallel to the west side of Route 23. *See* September 4, 2008 Tr. pg. 40. In the event service was requested on the eastern portions of these properties (east of Route 23), RCWC planned to bore under Route 23 to tap its six-inch waterline just across the road. *See* August 14, 2008 Tr. pg. 25 and September 4, 2008 Tr. pg. 40.

RCWC also constructed a ten-inch waterline in an east-west direction along Delano Road through the middle of the disputed area in 1974. *See* August 14, 2008 Tr. pgs. 8-9 and PX 4.

RCWC later constructed a second sixteen-inch waterline parallel to the ten-inch line in 2003 to provide a redundant back-up system should the ten-inch line fail at anytime. *See* August 14, 2008 Tr. pg. 16-17 and PX 7.

From the original ten-inch waterline, RCWC provided service to what is now known as the Cloverleaf property. This property consists of four adjacent parcels along Hospital Road from Delano Road north approximately 1,500 feet. In 2000, these parcels were owned by the Schmittauer and Younkin families, who operated a mobile home business on the property known as Tecumseh Home Center. On November 8, 2000, Tecumseh submitted an application for water service, and granted RCWC an easement to construct additional waterlines across and through the property. *See* PX 14 and PX 15. This easement was duly recorded with the Ross County Auditor's Office on May 9, 2001. *See* PX 15. Further, RCWC accepted Tecumseh's Water Service Application, and entered into a Water Users' Agreement on November 8, 2000. *See* PX 16.

This property was later sold to Cloverleaf Development Corporation sometime prior to March 2003, at which time the owners of Cloverleaf acknowledged to RCWC a desire to continue purchasing water from RCWC. *See* PX 17. On May 13, 2003, Cloverleaf granted RCWC an easement specifically for RCWC's redundant sixteen-inch waterline along Delano Road, and a future transmission line to run in a north-south direction along the proposed Hospital Road. *See* PX 56. This easement was duly recorded with the Ross County Auditor on August 22, 2003. *Id.* At that time, Hospital Road had not been completed north of Delano Road, but RCWC intended to construct a waterline extension from Delano Road to its line near Route 207 in order to loop its distribution system. This section of Hospital Road was only recently completed and RCWC began construction of its looping line on July 24, 2008 consistent with its

plans developed in 2003. *See* August 14, 2008 Tr. pg. 42 and September 4, 2008 Tr. pgs. 41-43.

On July 16, 2008, Cloverleaf executed a new Water Service Application in its own name, and granted additional easement rights to RCWC for the construction of future waterlines through its small 5.6 acre parcel purchased from the Schmittauers at the northern most portion of the disputed area. *See* PX 8, PX 18 and PX 19. The new application was accepted and Cloverleaf executed a Water User's Agreement on July 17, 2008. *See* PX 20. Michael Corcoran, a partner in Cloverleaf Development, Inc., testified that Cloverleaf intends to avail itself of the current RCWC tap located on its property. *See* September 4, 2008 Tr. pg. 102.

Shortly after receiving the final easement from Cloverleaf, RCWC began constructing its eight-inch line extension from the intersection of Hospital Road and Delano Road, north to connect to its existing line at the northern most point of the Route 207 connector. *See* September 4, 2008 Tr. pg. 19. Again, this extension was part of RCWC's long-term plans since the early 2000's to loop its water distribution system. *See* August 14, 2008 Tr. pg. 42. This construction was completed only weeks ago with the installation of a tap to serve the smaller 5.6 acre parcel owned by Cloverleaf once the Court lifted the connection ban imposed at the August 14, 2008 hearing.²

LAW AND ANALYSIS

The Agricultural Act of 1961 was enacted by Congress, in part, to provide federally insured loans to rural communities for a variety of otherwise unaffordable services and improvements. *Grafton v. Rural Lorain County Water Auth.*, 316 F. Supp. 2d 568, 574 (N.D. Ohio 2004). Title III of the Act, now known as the Consolidated Farm and Rural Development

² Incidentally, that tap connection was well beyond the 1500 feet north along Hospital Road from Delano Road, as defined by Chillicothe as the disputed area. *See* August 14, 2008

Act of 1972) (the "Act"), primarily addresses issues of agricultural credit. *Id.* Section 306(b) of the Act, now codified at 7 U.S.C. § 1926(b), protects the recipient of those federal loans from competition by expanding municipalities. *Id.*; *see, also Le-Ax Water Dist. v. City of Athens*, 346 F.3d 701, 707-08 (6th Cir. 2003); *see, also Moongate Water Co., Inc. v. Butterfield Park Mut. Domestic Water Ass'n*, 291 F.3d 1262, 1265 (10th Cir. 2002).

As a condition of receiving these loans, Congress mandated that:

the service provided or made available through any such association shall not be curtailed or limited by inclusion of the area served by such association within the boundaries of any municipal corporation or other public body, or by the granting of any private franchise for similar service within such area during the term of such loan....

7 U.S.C. § 1926(b);

Federal courts consistently hold that § 1926(b) establishes a “bright line rule” that unambiguously prohibits the curtailment of an association's service territory by any form of municipal encroachment – and that any doubts about whether a water association is entitled to § 1926(b) protection should be resolved in favor of the federally indebted water association. *Grafton*, 316 F. Supp. 2d 568, 574 (N.D. Ohio 2004); *see, also Adams County Reg'l Water Dist. v. Village of Manchester*, 226 F.3d 513, 517-18 (6th Cir. 2000); *Wayne v. Village of Sebring*, 36 F.3d 517, 527-28 (6th Cir. 1994).

In *Le-Ax*, the Sixth Circuit recently articulated that § 1926(b) was intended to protect the association's territory from the expansion of the boundaries of municipal and other public bodies into an area served by the rural system. *Le-Ax*, 346 F.3d at 705. This federal protection is based upon a theory of economies of scale, such that the association is able to spread its fixed costs over a large group of users. This maintains rural water costs at a reasonable level and promotes

the development of a system providing fresh and clean water to rural households, all while simultaneously protecting the federal government as insurer of the loan. *Id.*; *see, also Lexington S. Elkhorn Water Dist. v. City of Wilmore*, 93 F.3d 230, 233 (6th Cir. 1996).

A. RCWC is entitled to exclusively serve the disputed area under 7 U.S.C. § 1926(b).

To invoke the anti-curtailment protection of § 1926(b), an association must satisfy a three-prong test: (1) it is an ‘association’ within the meaning of the Act; (2) it has a qualifying outstanding USDA loan; and (3) it has provided or made service available in the disputed area. *See Village of Grafton v. Rural Lorain County Water Auth.*, 419 F.3d 562, 566 (6th Cir. 2005)

i. RCWC is an ‘association within the meaning of the Act.

The term ‘association’ includes any corporations not operated for profit, Indian tribes, and public and quasi-public agencies. *See Lexington-South Elkhorn Water Dist. v. City of Wilmore*, 93 F.3d 230, 234 (6th Cir. 1996). In Ohio, a rural water association can organize under the general non-profit corporation laws or under Chapter 6119 of the Ohio Revised Code. Importantly, federal courts uniformly apply § 1926(b) protection to both non-profit water associations and those organized under specific water supply statutes. *See, e.g., Rural Water System No. 1 v. City of Sioux Center*, 202 F.3d 1035, 1037 (8th Cir. 2000) (applying § 1926(b) protection to Iowa non-profit water association where Iowa law permits the formation of rural water associations under general corporation laws and water supply laws).

In this instance, RCWC is organized under R.C. § 1702.01 et seq., the general non-profit corporation laws of Ohio. *See* August 14, 2008 Tr. pg. 7-8 and PX 1. Applying the plain language of § 1926(b), RCWC is an ‘association’ within the meaning of the Act. *See, e.g. Jennings Water, Inc. v. North Vernon*, 895 F.2d 311, 312 (7th Cir. 1989) (applying § 1926(b) protection to non-profit water association).

ii. RCWC is indebted to the United States Department of Agriculture.

The testimony and documents introduced by RCWC evidence its current indebtedness to the USDA through five separate and outstanding loans. *See* August 14, 2008 Tr. pg. 49-52 and PX 26-PX 44. At present, RCWC's indebtedness is approximately 10.6 million dollars. *See* August 14, 2008 Tr. pg. 52. Each of these notes were issued under the provisions of the Consolidated Farm and Rural Development Act of 1972, and include express contractual obligations by RCWC to provide water service to all persons in Ross County who can feasibly and legally be served. *See, e.g.* PX 27, pg. 3, section 5(k).

As a condition precedent to receiving government funding, USDA mandates that an association serve any user within its service area who desires service and can be feasibly and legally served. Failure to provide service creates an immediate cause of action by the user against the association. Further, the association must obtain written concurrence of the USDA prior to refusing service to a user. *See* 7 CFR 1942.17.

iii. RCWC has provided and made service available in the disputed area.

The requirement that an association provide or make service available is generally the most litigated prong of every § 1926(b) inquiry. As a result, federal courts throughout the United States have established a fairly consistent approach to the determination of this fact, adopting an additional set of factors that consider the associations' legal right and ability to provide service.

The Sixth Circuit determines whether an association has made water service available by considering whether: (1) the association has pipes in the ground, and (2) the association has the legal right under state law to serve the disputed area. *See Village of Grafton*, 419 F.3d 562, 566.

The legal right to serve customers is derived from state laws, which are the genesis of any rural water association. In this case, RCWC's legal right to serve its customers arises under R.C.

§ 1702.01.

To satisfy the ‘pipes in the ground’ test, the association must have water lines within, or adjacent, to the disputed area prior to the municipal encroachment. *Lexington-South Elkhorn Water Dist.*, 93 F.3d 230, 237 (6th Cir. 1996). Based upon the existence of its lines, the association must also be able to provide service to the area within a reasonable time after a request for service is made. *Village of Grafton*, 419 F.3d 562, 576 (6th Cir. 2005); *see, also Pittsburg County Rural Water Dist. No. 7 v. City of McAlester*, 358 F.3d 694, 713 (10th Cir. 2004) (rural water association need not be able to provide service “today,” if it has adequate facilities adjacent to the area and can provide service within a reasonable time). Finally, the association must have sufficient volume and pressure to provide service. *Cf. Bell Arthur Water Corp. v. Greenville Utils. Comm'n*, 173 F.3d 517, 526 (4th Cir. 1999) (finding that six inch waterline was not sufficient where evidence indicated a fourteen-inch line required).

Here, RCWC first laid its lines in the disputed area in the early 1970s as part of its initial infrastructure. The record is replete with testimony from William Neal, General Manager of RCWC, regarding the location of RCWC’s waterlines along Delano Road and Route 23. *See* August 14, 2008 Tr. pgs. 11 – 27 and PX 9 and PX 10. Indeed, these waterlines are both within *and* adjacent to the disputed area. *See Sequoyah County Rural Water Dist. No. 7 v. Town of Muldrow*, 191 F.3d 1192, 1205 (10th Cir. 1999) (rural water association with pipes one mile from disputed area could provide service within a reasonable time).

A portion of the disputed area includes property known as the Warner parcel. This parcel encompasses over 72 acres, and is bisected by Route 23. *See* PX11 and August 14, 2008 Tr. pgs 28–29. Notably, the Warners are current RCWC customers. *Id.* Chillicothe has alluded that the bisection of the Warner parcel by Route 23 leaves the eastern portion of the property open for

competition to provide water service. Yet Chillicothe's argument fails.

As repeatedly stated in almost every §1926(b) dispute, a water association makes service available by maintaining adequate waterlines within or *adjacent* to the disputed area. *See Village of Grafton*, 419 F.3d 562. RCWC's six-inch waterline along the western portion of the Warner parcel satisfies this requirement. Moreover, RCWC maintains both a ten-inch and a sixteen-inch water transmission line along the northern boundary of the Warner parcel. *See* PX 10.

The pressure in these lines is approximately 150 pounds per square inch, compared to the pressure in Chillicothe's waterlines serving the nearby hospital at 50 pounds per square inch. *See* September 4, 2008 Tr. pgs. 86-87. Based upon these results, Chillicothe did not provide any evidence to rebut the fact that RCWC has more than sufficient pressure and capacity to serve the disputed area.

In light of Chillicothe's failure to pass legislation authorizing the construction of waterlines north of Delano Road, RCWC's entitlement to serve that portion of the disputed area is unquestionably clear. But in the event Chillicothe attempts to ratify its otherwise unlawful plans, RCWC can establish its entitlement to exclusively serve the disputed area under the same criteria most recently established in *Village of Grafton*, 419 F.3d 562. Indeed, RCWC has maintained waterlines on the west side of Route 23 since the early 1970s and has made water available to what is now known as the Cloverleaf parcels for seven years. *See* September 4, 2008 Tr. pg. 30 and PX 46, pg. 6.

Besides the Warner property, the Cloverleaf parcels are the only other parcels in the disputed area. Again, RCWC has maintained a water transmission line along Delano Road since the 1970s. In fact, this area can be served by both a ten-inch *and* a sixteen-inch water main with up to 150 pounds of pressure per square inch. RCWC has provided or made service available to

the Cloverleaf parcel for over seven years when it was known as the Tecumseh property and owned entirely by the Schmittauers. *See* PX16.

iv. *Le-Ax* supports RCWC's position.

Throughout this litigation, Chillicothe has insinuated that RCWC is using the protection afforded under § 1926(b) as a sword rather than a shield by recently adding an eight-inch waterline extension along Hospital Road in the disputed area. *See Le-Ax Water Dist.*, 346 F.3d 701, 707-08 (6th Cir. 2003). Yet by asserting such a proposition, Chillicothe ignores RCWC's long-standing presence within and adjacent to the disputed area since the 1970s. Further, RCWC had planned to construct the eight-inch extension for several years in an effort to reduce the cost of boring under Route 23 (and to keep water rates low) to serve customers from its six-inch waterline on the west side of the highway. *See* August 14, 2008 Tr. pg. 27.

Notwithstanding its decision to add the eight-inch line, RCWC has always been able to provide service to properties along the east side of Route 23 by simply boring under the highway from its six-inch line. Even Chillicothe admits that this process is simple and more feasible than tearing up a road. *See* September 4, 2008 Tr. pg. 92.

Most importantly, the *Le-Ax* holding is very limited in scope and not applicable to the facts of this case. *Id.* at 709-10. The *Le-Ax* court carefully explained that its decision to limit the water district's territory to the area described in the original court order has no application to general non-profit water associations. *Id.* (“Because of the distinction between offensive and defensive uses can be difficult to delineate, we take care to limit the scope of our holding. This is not a case where a defendant has intruded on a water association's actual or operative service area”).

In *Le-Ax*, the water district had boundaries “geographically determined by the state.” The Court distinguished its holding from a fact pattern existing in the case at bar: “...*Le-Ax*’s boundaries are clearly defined by state law; we do not consider here a case where the state has not defined the boundaries of its water districts or associations.” *Le-Ax*, 346 F.3d at 710.

In so distinguishing itself from cases with a fact pattern like the instant case, the court in *Le-Ax* cited the case *N. Shelby Water Co. v. Shelbyville Mun. Water & Sewer Comm’n*, 803 F. Supp. 15 (E.D. Ky. 1992). Specifically, the *Le-Ax* court noted that under Kentucky law there was no definition of the phrase “service area” to delineate North Shelby’s territory. Accordingly, the *Le-Ax* court distinguished the *N. Shelby* case and refused to allow § 1926(b) protection outside the water district’s state-defined boundaries.

In *N. Shelby*, the court cited § 1926(b) and its language that, “[t]he service provided or made available through any such association shall not be curtailed or limited by inclusion of the area served by such association within the boundaries of any municipal corporation....” *N. Shelby*, 803 F. Supp. 15, 21. The court then noted that, “[t]here is no operative definition under Kentucky law of the phrase ‘service area’ to delineate North Shelby’s territory. *Id.*

In defining the service area of a water district with no state-defined service area, the court in *N. Shelby* determined that the water district’s service area was any place it had actual distribution lines or made water service “available” to potential customers, explaining:

North Shelby’s “distribution” lines in these areas are lines “from which service connections with customers are taken at frequent intervals.” 807 KAR 5:066(3). To receive water service, a customer must be connected by a service line to a distribution line. *Id.* §§ (4) and (5). As a utility regulated by the PSC, North Shelby is required to make, “reasonable” extensions of its water lines to serve any customer who would apply for service from one of its distribution lines [TR, pp. 168-169]. KRS 278.280(3); *City Bardstown v. Louisville Gas and Electric Co.*, Ky., 383 S.W.2d 918, 920 (1964). The obligation to make a reasonable extension to any requesting customer exists regardless of whether the existing distribution

line runs down the same side of the road on which the proposed customer's property is located, or is on the opposite side of the road [TR, pp. 138-140]. When a service line is installed to connect a customer to a distribution line, North Shelby is required to pay for the first fifty feet of the extension. For any extension exceeding fifty feet, the customer would be required to pay the additional cost, although refunds are made for the customer's payment if other customers later connect during a certain period of time. [TR, pp. 121-122].

Thus, while North Shelby has never actually "provided" water service to any customer within the subject subdivisions, it has, under Kentucky law, made water service "available" to potential customers within the subdivisions by virtue of the proximity of North Shelby's distribution lines to Brassfield/the Meadows, and the location of a distribution line within the Partridge Run Estates property.

From the conclusion that North Shelby has made water service "available" to the areas in question within the meaning of § 1926(b), it is undisputed that the Commission's present and prospective water service provided to the subject subdivisions has "curtailed or limited" that which North Shelby could provide in violation of § 1926(b). The additional net revenue North Shelby would receive if it were to serve the subdivisions, over the remaining term of North Shelby's loans with the FmHA, is significant. The additional net revenue North Shelby would receive would be available to reduce its per user costs, and would make its loans from the FmHA more secure, which are among the purposes for which § 1926(b) was enacted. *Jennings*, 895 F.2d at 315.

The fact that North Shelby's water lines, as to Brassfield/the Meadows, are simply adjacent to, but not within, that property does not defeat North Shelby's entitlement to the protections of § 1926(b) as to that property. Because North Shelby is required under Kentucky law to provide extensions of service to potential customers located reasonably near to its distribution lines, North Shelby is capable of providing water service to the subdivisions within a reasonable time after application for service. *Glenpool*, 861 F.2d at 1213. Contrary to the Commission's argument, the fact that North Shelby does not have water lines nor prior customers actually within the Brassfield/Meadows property is not dispositive.

Id. at 22 (emphasis added).

Applying the rationale of *N. Shelby*, a similar conclusion presents itself to the fact pattern of the instant case. Pursuant to 7 CFR 1942.17 and RCWC's Resolution and Loan Security Agreement adopting the regulatory language of § 1942.71, RCWC accepted certain responsibilities upon accepting the benefits of the USDA loan, namely the commitment to serve

all water users who desire service and to whom service is “feasible”. *See* PX 27, pg. 3, section 5(k).

In this case, Chillicothe presented no evidence to rebut the fact it is not only feasible to supply water to the disputed area, it can be done almost overnight. RCWC’s service area is thus any area where there are distribution lines and a feasibility to reach customers who desire service. This includes the property disputed in this case.

Such a result furthers the underlying policy of § 1926(b). Having made the financial commitment to place large-volume distribution lines, the USDA loan will be better secured as more development occurs near these lines and more people connect to them. This results in more net revenue and affordable water costs for rural users. *N. Shelby*, at 22. *See, also, Lexington S. Elkhorn*, 93 F.3d at 233.

- v. The ability to provide fire protection is not required to establish § 1926(b) protection.

Chillicothe (through its previous briefs) has alluded that RCWC’s alleged inability to provide fire protection limits or negates § 1926(b) protection. Although RCWC can provide fire protection in the disputed area as demonstrated through PX 58 and PX 59, the provision of such service is not required by § 1926(b). The Tenth Circuit specifically addressed this issue, stating, “...because § 1926(b) was not enacted to supply fire protection, a water association's capacity to provide fire protection is irrelevant to its entitlement to protection from competition under § 1926(b).” *Sequoyah County Rural Water Dist. No. 7 v. Town of Muldrow*, 191 F.3d 1192, 1204 (10th Cir. 1999); *see, also Rural Water Dist. v. Owasso Utilities Authority*, 530 F. Supp. 818, 823 (N.D. Okla. 1979) (holding § 1926(b) was not enacted for the purposes of fire protection, but rather to provide means of securing a “safe and adequate supply of running household water.”)

Indeed, § 1926(b) grants exclusivity to qualifying providers of potable water, and has no impact on a municipalities right to offer fire protection through its own waterlines. *See Water Works Dist. No. II v. Hammond*, 1989 U.S. Dist. LEXIS 11752 (E.D. La. Oct. 3, 1989) (while the city will be enjoined from supplying water service to the disputed area, it may maintain and use its water mains and pipelines for fire protection purposes). Again, even if fire protection were an issue, we note RCWC recently provided almost one million gallons of water to multiple fire departments fighting a train fire just east of the disputed area. *See* PX 58 and PX 59.

vi. The cost of RCWC's water service is not a factor in this case.

The cost of RCWC's water service is comparable to that of Chillicothe. In fact, as the customer uses more water, the cost for RCWC water service becomes less than the cost for Chillicothe's service. The average home consumes approximately 4,000 gallons per month. For 3,740 gallons a month, RCWC charges \$33.31 and Chillicothe charges \$29.84. As long as the association's user fees are not "excessive, unreasonable, or confiscatory," 1926(b) applies. *See Pittsburg County Rural Water District No. 7 v. City of McAlester*, 346 F.3d 1260, 1285 (10th Cir. 2003). A four dollar difference per household per month is neither excessive, unreasonable, nor confiscatory. Moreover, a commercial or residential customer that uses more water will actually save money as a RCWC member.

vii. Ohio law does not supersede the application of § 1926(b).

Chillicothe argued in its pre-hearing brief that § 1926(b) conflicts with the Ohio Constitution and Revised Code. Notably, this very same argument was advanced by the City of Athens in *Le-Ax v. City of Athens*, 174 F. Supp. 2d 696 (S.D. Ohio 2001). Specifically, Athens argued that § 1926(b) improperly interferes with powers reserved to the State of Ohio, and displaces Ohio's commitment to municipal control of public utilities and annexation. *Id.* at 708.

Judge Algenon Marbley in his trial court decision, found that “[s]ection 1926(b), even when interpreted to grant protection to Le-Ax, does not violate the Tenth Amendment.” *Id.* He further found that the protection afforded to Ohio rural water associations through § 1926(b) is consistent with Congressional intent, and that “Ohio has voluntarily and knowingly accepted the [conditions of § 1926(b)], as evidenced by the Ohio laws that authorize the creation of water districts and the contracting of such water districts with the Department of Agriculture.” *Id.* The Sixth Circuit left Judge Marbley’s finding on this issue undisturbed. *Le-Ax Water Dist.*, 346 F.3d 701, (6th Cir. 2003).

Now, Chillicothe is beating the proverbial ‘dead horse’ by continuing to challenge the constitutionality of § 1926(b). Indeed, this issue has been addressed in several seminal § 1926(b) cases, each time favoring the application of § 1926(b) over a competing state statute. *See Village of Grafton*, 419 F.3d at 567 (village’s exclusive rights under the Ohio Constitution to provide utility services even *within* its boundaries are limited by § 1926(b)); *see, also City of Madison v. Bear Creek Water Assoc.*, 816 F.2d 1057, 1061 (5th Cir. 1987) citing *Helvering v. Davis*, 301 U.S. 619, 645, 57 S. Ct. 904, 910, 81 L. Ed. 1307 (1936) (“When money is spent to promote the general welfare, the concept of welfare or the opposite is shaped by Congress, not the States. So the concept be not arbitrary, the locality must yield.”).

B. RCWC is entitled to injunctive relief.

1926(b) jurisprudence consistently applies principles of injunctive relief to protect a rural water association from municipal encroachment. *See e.g. North Alamo Water Supply Corp. v. City of San Juan*, 90 F.3d 910, 917 (5th Cir. 1996) (“Section 1926(b) does not create or specify a remedy for the enforcement of violations, but an injunction has been the principal tool employed by the courts with which to enforce the statute and prevent violations.”) With respect to

demonstrating irreparable harm, the Seventh Circuit noted, “irreparable injury is not an independent requirement for obtaining a permanent injunction; it is only one basis for showing the inadequacy of the legal remedy.” *Jennings Water, Inc. v. North Vernon*, 895 F.2d 311, 318 (7th Cir. 1989). Because 1926(b) prohibits *any* encroachment by a municipality, “injunctive relief is clearly the appropriate remedy to ensure the continued, uninterrupted service by the federally indebted entity.” *Id.* Here, Chillicothe is attempting to encroach upon and curtail RCWC’s service territory in contravention of § 1926(b). To protect its territory and to ensure its ability to repay outstanding debts to the United States, RCWC is entitled to an injunction prohibiting Chillicothe from providing water service in the disputed area.

CONCLUSION

Based upon the foregoing argument, exhibits, and testimony presented in this case, RCWC respectfully requests that this Honorable Court grant RCWC the relief sought in its Verified Complaint.

Respectfully submitted,

STUMPHAUZER O’TOOLE McLAUGHLIN
McGLAMERY & LOUGHMAN CO., LPA

/s/ Dennis M. O’Toole

Dennis M. O’Toole (#0003274)
Attorney for Ross County Water Company
5455 Detroit Road
Sheffield Village, Ohio 44054
Telephone: 440.930.4001
Facsimile: 440.934.7208
dotoole@sheffieldaw.com

CERTIFICATE OF SERVICE

This will certify that a copy of the foregoing Plaintiff's Post Hearing Brief in Support of Temporary Restraining Order was filed electronically this 26th day of September, 2008. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system or via electronic mail.

/s/ Dennis M. O'Toole
